



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
PROBATE AND ADMINISTRATION DIVISION
SUCCESSION CAUSE NO. 1167 OF 2004
IN THE MATTER OF THE ESTATE OF FREDDIE KISANG CHESEREK (DECEASED)

COLLETA JEROTICH KOMORA

MARGARET CHEROTICH KISANG

DENIS KIMTAI KISANG..... OBEJECTORS/APPLICANT

- VERSUS -

MARY MULWANI KISANG

VIOLET CHELANGA KISANG.....ADMINISTRATORS/RESPONDENT

R U L I N G

1. The deceased to whose Estate these proceedings relate is Freddie Kisang Cheserek, who died on 28th June 2004 while domiciled in Kenya. Letters of administration intestate of all his Estate were issued to his widow Mary Mulwani Kisang, (hereinafter the Respondent), on 28th June 2004 and confirmed vide certificate of confirmation of grant dated 7th March 2005.
2. On 25th February 2015 Colleta Jerotich Komora, Margaret Cherotich Kisang and Denis Kimtai Kisang (hereinafter the Objectors), filed summons for revocation of the said grant in their capacity as beneficiaries of the deceased's Estate. In the said summons the Objectors sought orders that:
 1. a temporary injunction do issue restraining the administrators from wasting, selling, disposing, subdividing and/or in any way dealing with the Estate of Freddie Kisang Cheserek pending the hearing and determination of this application interpartes.
 2. there be a permanent injunction prohibiting the Administrators, their servants, agents and or employees from interfering, selling, evicting, or dealing in any way with or otherwise intermeddling with LR. N. Tran Nzoia/Milimani/513 which forms part of the estate.
 3. the Grant of Probate made to Mary Mulwani Kisang and Violet Chelanga on 28th June 2004, confirmed on 7th March 2005 and rectified on 9th July 2013 be revoked and/or annulled.
 4. a grant of letters of administration to the estate of the late Freddie Kisang Cheserek be

issued to the two widows of the deceased namely Colleta Jerotich Komora and Mary Mulwani Kisang and in the alternative the current Objectors.

5. an order be issued to the Administrator to give an inventory and provide a full disclosure of all copies and properties of the deceased and provide full and fair accounts of the Estate of the deceased, and for any properties disposed off and proceeds from the Estate from 28th June 2004 up to date.
3. In the grounds of the summons the Objector states that she is the second wife of the deceased, having been married to him in 1991 under Marakwet Customary Law and that they were blessed with two issues Anthony Kipchirchir born in 1994 and Irene Jepkosgei born in 1997 respectively. She alleges that the Grant of Letters of administration intestate in the Estate of Freddie Kisang Cheserek issued to the Respondent and confirmed on 7th March, 2005 was obtained fraudulently by making of a false statement and concealment from court of the fact that the deceased had another wife and children who solely depended on him. Further that reasonable provision for the other beneficiaries of the Estate of the deceased was not made.
4. The Objector also avers that upon obtaining the Grant, the Administrators have fraudulently been wasting and alienating the Estate of the deceased and have failed in their fiduciary duty as Administrators. That the Administrators have failed to produce to the Court a full inventory of all the assets, accounts and dealings herein up to date. That the property subject to distribution has been interfered with, hence the Administrators did not proceed diligently with the administration of the Estate as the assets/properties have been sold off. That the Administrators want to sell the property known as Trans Nzoia/Milimani/513 which is the only source of the applicant's livelihood.
5. The summons was opposed by the Respondent's replying affidavit, in which she admitted that she is one of the Administrators of the Estate of Freddie Kisang Cheserek (deceased). She asserted that the Applicant made the application in bad faith and it is an abuse of the court process since she had also made a similar application, seeking similar orders in an application dated 17th November 2011 which was dismissed by court for lack of merit.
6. The Respondent deponed that she is the only widow of the deceased having been married to the deceased in 1982 and that during the deceased's life, she was not aware of any other wife of the deceased. That she only became aware of the first Applicant's claims that she was the second wife of the deceased, from her application for revocation of the Grant herein on 17th November 2011 after she was served with court papers. That the deceased's family and kinsmen who have deliberated on several matters of the Estate have always referred to her as the only wife of the deceased to date.
7. The Respondent further deponed that the Applicant never attended the deceased's burial nor did she bring the alleged children of the deceased to attend their father's burial, or to be introduced to the family. According to the Respondent, the Applicant has never contracted any marriage with the deceased.
8. I have considered the application, the affidavits for and those against, as well as the rival submissions by counsel for the respective parties, and have determined that the main issue for consideration at this juncture, is whether the Applicant's application merits the exercise of the discretion of this court in her favour, to grant the orders sought in prayer No.1. Ideally the applicant should have brought the summons for revocation and the application for injunctive orders separately.
9. In prayer No. 1 the Applicant seeks from the court orders restraining the Respondent from selling, or transferring, or in any other manner howsoever dealing with the Estate of the deceased, pending the hearing and determination of the petition. No injunctive orders against the Respondent were granted on interim basis pending interpartes hearing.

10. There is no doubt that the parties have raised a number of issues in both their affidavits and submissions, some of which I am afraid, are not relevant at this point in time. What is for consideration is the application for temporary injunction pending the hearing and determination of the summons for revocation of grant. The said summons is not being determined at this stage and is not the concern of this Court at the moment. The Applicant, as has been stated, has asked the court to issue restraining orders as against the Respondent. That is what this court can properly deal with.
11. The time tested decision in the case of **GIELLA –VS- CASSMAN BROWN & CO. LTD. (1973) E. A. 358**, laid down the now settled principles for the granting of an injunction. These are that an applicant must show first, that he/she has a prima facie case with a probability of success; second, that the applicant might suffer irreparable injury if the injunction is not granted; and third, if the court is in doubt, it will decide an application on the balance of convenience.
12. It has been argued that this application was brought in bad faith and is an abuse of the court process, a similar application dated 17th November, 2011 seeking similar orders having been determined earlier. In other words it alleged that this application is Res Judicata. I have perused the record and find that this application is not Res judicata, since the summons for Revocation was not determined on merit. When it came before the court on 18th November 2011 the court declined to grant the orders sought and directed that it be served and directions taken first.
13. The application is premised on the Applicant's claim that she is the second wife of the deceased who sired children with the deceased and is living in one of the properties of the deceased on which the deceased himself is said to have installed her. In the circumstances of the cause before me, I find that the Applicant has made out a prima facie case. Should it be proven that the deceased indeed, had a second family who were shut out of, his Estate they may suffer irreparable loss since the Estate is in the process of being disposed of as admitted in paragraph (g) of the Respondent's affidavit.
14. It is therefore my view that for the interests of justice to be met, this court should exercise its discretion in favour of the Applicant by granting the orders sought. I accordingly allow the application limited only to the terms of prayer (1). I further direct that the summons for Revocation dated 25th February 2015 be served and listed for directions on a date to be given in the Registry on priority basis.

It is so ordered.

SIGNED DATED and DELIVERED in open court this **19th day of May 2015**.

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L. A. ACHODE

JUDGE

In the presence ofAdvocate for the Applicants

In the presence ofAdvocate for the Respondent